Supreme Court of the United States

OCTOBER TERM, 1956

No. 59

HENRY FERGUSON,

Petitioner,

vs.

MOORE-McCORMACK LINES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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Opinion Below.

The opinion of the United States Court of Appeals for the Second Circuit is reported at 228 F. 2d 891 and is printed at pages 118-119 of the Record.

Jurisdiction.

The final judgment of the United States Court of Appeals for the Second Circuit was entered on January 18, 1956 (R 119-120). The petition for a writ of certiorari was filed on April 7, 1956 and was granted May 21, 1956 (R. 120). The jurisdiction of this Court rests on 28 U.S.C. 1254 (1) and 2101 (c).

The Questions Presented.

1. Where a shipowner negligently fails to provide a necessary simple tool (an ice chipper) and a seaman in order to carry out the work he was ordered to do uses a knife which is a hazardous tool for the work and suffers injury in its use, must he prove that the shipowner could have reasonably foreseen the use of the knife in order to make out a case under the Jones Act?

2. Is the defense of assumption of risk still available to a shipowner who negligently fails to provide a necessary simple tool for his work but cannot reasonably foresee that a hazardous tool will be used to do the work in the absence of a necessary one?

3. Where a jury on ample evidence has found that a seaman was impliedly ordered to use a hazardous simple tool, does he assume the risk even though he used it in obedience of orders?

4. Where a jury on ample evidence has found that a shipowner could reasonably anticipate that a seaman would use a hazardous simple tool to do his work in the absence of a necessary one, may such a jury finding be set aside in a Jones Act case in which the seaman has a statutory guaranty of trial by jury?

The Statutes Involved.

Section 33 of the Act of June 5, 1920, C. 250, 41 Stat. 988, 1007, Title 46, United States Code § 688 known as the Jones Act, reads as follows:

> "Sec. 33. That section 20 of such Act of March 4, 1915, be, and is, amended to read as follows:

"Sec. 20. Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action, all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The Federal Employers' Liability Act, 35 Stat. 65: 45 U.S.C.A., Sec. 51:

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

The Federal Employers' Liability Act, 35 Stat. 66, 45 U.S.C.A. 54:

> "That in any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Statement.

Petitioner, a seaman, sued under the Jones Act for damages for personal injuries sustained because of Respondent's negligence (R. 1-3). At the end of Petitioner's case in the District Court, Respondent moved for a directed verdict; its motion was denied; Respondent then rested without offering any proof (R. 90-93). The jury returned a verdict for Petitioner for $17,500; the trial judge again denied Respondent's motions and judgment was entered for Petitioner (R. 115-117). The Court of Appeals reversed, holding that Respondent's "motion for a directed verdict should have been granted" (R. 118-119).

Petitioner was employed by Respondent as a second baker on its first class passenger ship Brazil and it was one of his duties to fill the orders of the ship's waiters for ice cream (R. 37-38). On March 27, 1950, at about 8:40 P.M., Petitioner

received an order from a ship's waiter for 12 portions of ice cream (R. 38, 44). The ice cream was in a 2½ gallon container setting in a refrigerated tempering chest in the bake shop (R. 40-42, 86-87; see Plaintiff's Exs. 3A, 3C and 3E). Petitioner had been filling orders for ice cream from this container but when he got about half way down in the container, he found the ice cream "hard as a brickbat"; it was so hard that the hemispherical scoop, the only tool Respondent provided for the work, was useless because it could not penetrate the ice cream (R. 38-39, 42-43, 46, 120-123). Respondent did not provide a necessary tool for filling orders when the ice cream was too hard for the use of the scoop. An ice chipper (plaintiff's Ex. 5) would have broken the hard ice cream into small particles which could have been made into balls by the scoop; petitioner had used such a tool in that way in serving hard ice cream on other ships (R. 46-47). Petitioner worked under a superior, the ship's chef, who gave him this order: "When the waiters come up to get the orders, that they should get what they ask for and give them good service" (R. 45-47). Lacking the essential ice chipper and under the compulsion of the chef's orders and the waiter's order for 12 servings, Petitioner took the only thing he could find, a ship's butcher knife kept nearby, grasped it and using it as a chipper, chipped the hard ice cream into small pieces which he formed into balls with the scoop to fill the order (R. 38-39, 44, 46). He made nine servings that way when the point of the knife struck a spot in the ice cream which was so hard that it caused his hand to slip down the blade of the knife and he suffered an injury resulting in the loss of two fingers of his right hand (R. 44-45, 39-40, 119). Petitioner and the third baker had previously used the knife on hard ice cream (R. 67-68).

Respondent stored its ice cream in a refrigerated box on D deck at 5 degrees below zero (R. 8-10, 30-32, 78-79). Such ice cream is too hard to serve and must be transferred to a tempering chest and kept there at 8 to 13 degrees above zero

for 12 to 24 hours before the entire contents of a 2½ gallon container becomes soft enough for dispensing with a scoop (R. 84-89). Respondent's tempering chest located in the bake shop, was set at zero to 10 degrees above zero which was too low for proper tempering or thawing of ice cream (R. 10-12, 80, 85). The tempering chest was not in good mechanical condition. Respondent's refrigerating engineer (Respondent took his deposition and Petitioner read it at the trial, R. 5), testified that he could not say whether the chest was in good working order and condition on the day of the accident (R. 13-14); that they had trouble with it then and still have trouble with it which they cannot correct (R. 19, 25-26, 29), and that no readings of the temperature in the chest were made or kept (R. 26-27, 80). In answer to an interrogatory as to when ice cream for the evening meal was transferred to the tempering chest, Respondent answered: "Between the noon and evening meals if there was then an insufficient amount for the evening service already available" (R. 79). Petitioner testified that the ice cream for the evening meal was usually brought up about 1:00 o'clock in the afternoon, but he did not know when the ice cream he was working on at the time he was injured was placed in the tempering chest (R. 50-51). Respondent did not keep its containers of ice cream in the tempering chest a sufficient length of time for the bottom half of the container on which plaintiff was working when injured to become serviceable or "dipable" by means of a scoop (R. 39, 43, 87-89).

Petitioner had nothing to do with the storage of the ice cream or its transfer to the tempering chest (R. 47-48), his only job with respect to ice cream was filling the orders of the waiters (R. 38).

As the uncontradicted proof shows that respondent did not maintain its tempering chest in an adequate state of repair and at the proper temperature for tempering or thawing ice cream and did not keep its ice cream in the chest long

enough to become serviceable or dispensable throughout by means of a scoop, the sole tool it provided, Respondent knew but it failed to provide an adequate tool for dispensing its ice cream and that under the compulsion of the job and orders, Petitioner might use the only other available tool—a knife in place of the ice chipper it failed to provide.

The court submitted the case to the jury on well established principles of maritime law; that Respondent owed Petitioner the duty of providing a safe place in which to work, safe and adequate tools to do the work, safe ice cream on which to work, and that Respondent was chargeable with knowledge of the condition of its ice cream; that Petitioner, a seaman, was bound to obey the implied as well as expressed orders of his superiors (R. 95-113).

The Court of Appeals reversed on the sole ground that the use of the knife as an ice chipper, which Respondent failed to supply, "was not within the realm of reasonable foreseeability" (R. 118-119).

ARGUMENT.

I.

The common law doctrine of "reasonable foreseeability" of harm has never before been applied to defeat recovery in a Jones Act case based on a defective appliance or failure to provide an adequate one. In applying the doctrine, the United States Court of Appeals for the Second Circuit has established a new rule of law—which permits a shipowner to supply defective appliances and fail to provide adequate or necessary ones unless he can reasonably foresee harm from his conduct—which is contrary to public policy, decisions of this Court, and other United States Courts of Appeals as well as its own prior decisions.

A shipowner has an absolute non-delegable duty of providing his seamen with safe, adequate and necessary appliances to carry out their work and the exercise of due diligence does not discharge that duty, *Pacific American Fisheries* v. *Hoof*, 9 Cir., 291 Fed. 306, certiorari denied 263 U.S. 712, 44 S. Ct. 38, 68 L. Ed. 520; *Carlisle Packing Co.* v. *Sandanger*, 259 U.S. 255, 66 L. Ed. 927, 42 S. Ct. 475; *Mahnich* v. *Southern S.S. Co.*, 321 U. S. 96, 64 S. Ct. 455, 88 L. Ed. 561; *Socony-Vacuum Oil Co.* v. *Smith*, 305 U.S. 424, 83 L. Ed. 265, 59 S. Ct. 262. The duty is recognized by the common law in non-maritime torts, *Mahnich* v. *Southern S.S. Co.* (supra). The duty is a continuing one which lasts all during the seaman's employment, *Pacific American Fisheries* v. *Hoof* (supra); *Cleveland-Cliffs Iron Co.* v. *Martini*, 6 Cir., 96 F. 2d 632. While breach of the duty may be enforced by an action at law for unseaworthiness, *Seas Shipping Co. Inc.* v. *Sieracki*, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099, it also may be enforced by an action for negligence under the Jones

Act, *Socony-Vacuum Oil Co.* v. *Smith* (supra); *Krey* v. *United States*, 2 Cir., 123 F. 2d 1008. As the duty is non-delegable, not discharged by the exercises of due diligence, and is a continuing one, the shipowner's actual knowledge of breach of the duty need not be proved for it is always imputed to him, *Pacific American Fisheries* v. *Hoof* (supra). Therefore, the mere breach of the duty satisfies the negligence requirements of the Jones Act, *Storgard* v. *France & Canada SS Corp.*, 2 Cir., 263 Fed. 545, certiorari denied 252 U.S. 585, 40 S.C. 394, 64 L. Ed. 729; *Krey* v. *United States* (supra). This is so even where the shipowner has surrendered possession and control of his vessel to another, *Standard Oil Co.* v. *Robins Dry Dock & Repair Co.*, 25 F. 2d 339, aff'd 2 Cir., 32 F. 2d 182, and where the defective appliance is set up by an independent contractor, *Shields* v. *United States*, 3 Cir., 175 F. 2d 743. Mere breach of the similar duty to provide a safe place to work satisfies the negligence requirements of the Federal Employers' Liability Act where the injury was sustained on the property of another over which the railroad had neither knowledge nor control, *Terminal R. Ass'n of St. Louis* v. *Fitzjohn*, 8 Cir., 165 F. 2d 473.

To impose an additional element of negligence—"reasonable foreseeability" of harm—in Jones Act appliance cases, is to require proof of actual rather than imputed knowledge and to establish a new and novel rule of law permitting a shipowner to provide a defective appliance and to fail to supply an adequate or necessary one where there is no "reasonable foreseeability" of harm. Such a rule would permit the shipowner to escape liability in many instances for breach of his absolute duty to provide safe, adequate and necessary appliances.

Save for this novel decision of the Court below, we know of no decision in a Jones Act appliance case holding "reasonable foreseeability" of harm a prerequisite of recovery. The authorities cited by the Court below to support its hold-

ing do not do so and are not at all in point. *Manhat v. United States,* 2 Cir., 220 F. 2d 143, ceritorari denied 349 U.S. 966, 75 S. Ct. 900, 99 L. Ed. 1288, did not involve a defective appliance or lack of an adequate one. It was a third party action brought by a repairman who sustained injury when one of his co-employees working inside a lifeboat with him released obvious, safe and proper lowering gear causing the boat to fall. The Court held that such an occurrence could not be foreseen. *Fitzpatrick v. Fowler,* D.C. Cir., 168 F. 2d 172, was a suit by a shoreside domestic servant, for injuries sustained when she tripped and fell in a hole in the floor covering on her working place. The Court held that she assumed the risk because she had knowledge of the defect when injured. In *Wm. Johnson & Co. Ltd. v. Johansen,* 5 Cir., 86 Fed. 886, a seaman was given new, unpliable rope and too short a toggle pin for use in rigging a boatswain's chair which caused it to fall while he was sitting in it and painting the mast. Although the seaman did not question the materials furnished and he could have obtained more suitable material or secured the chair in another way, the Court held he did not assume the risk but was guilty of contributory negligence and halved his damages.

Strangely, 36 years ago in a frequently cited case, *Storgard v. France & Canada S.S. Corp.,* 2 Cir., 263 F. 545, the Court below rejected the very doctrine of "reasonable foreseeability" it now enunciates; there a seaman, in ascending a mast, used a ring attached to a sail; the ring was not designed for that purpose and a defective bolt attached to it caused an injury; the seaman's action was one in negligence for maintaining a defective appliance and the Court of Appeals, in speaking of the shipowner's liability at page 547, said:

> "* * * it makes no difference whether they as reasonable men would not have apprehended the particular accident which actually did happen."

This Court did not apply the doctrine of "reasonable foreseeability" of harm in defective appliance cases clearly calling for its application if it were available to the shipowner, *Socony-Vacuum Oil Co.* v. *Smith* (supra); *Mahnich* v. *Southern S.S. Co.* (supra). In both cases, the shipowner provided a safe appliance and a seaman voluntarily selected an unsafe one, yet in fastening liability on the shipowner for breach of duty, this Court did not even discuss the doctrine.

This Court has often held that the Jones Act is remedial and designed to enlarge the rights of seamen; that in drawing from maritime and common law sources, Courts wherever necessary should liberalize the rules rather than restrict them by a refined process of reasoning or resort to old discredited common law concepts, *Jamison* v. *Encarnacion*, 281 U.S. 635, 50 S. Ct. 440, 74 L. Ed. 1082; *Cortes* v. *Baltimore Insular Line*, 287 U.S. 367, 53 S. Ct. 173, 77 L. Ed. 368; *De Zon* v. *American President Line*, 318 U.S. 660, 63 S. Ct. 814, 87 L. Ed. 1065. It would be an anomaly to permit a duty recognized by the general maritime law and the common law to be watered down and restricted where the Jones Act is invoked to enforce it.

The contributory negligence rule as applied in cases under the Jones Act and the general maritime law gives the shipowner ample protection against the seaman's negligence in selecting a hazardous appliance when a safe one is available or, as here, in using a hazardous tool where a necessary one is not provided, *Socony-Vacuum Oil Co.* v. *Smith* (supra).

The prudent and efficient shipowner can find no burden in fulfilling his absolute duty to provide necessary, adequate and fit appliances for his ship. Certainly he is content to let liability flow from the mere breach of the duty as it always has, for it is not in his interest, that an owner who fails to provide the requisite appliances escape liability because the harm arising out of his breach, in the words of the Court below, "was not within the realm of reasonable foreseeabil-

ity." Such a condition which the Court below has engrafted onto the duty makes it no longer absolute, and impairs the efficiency of our merchant marine in the vital matter of ships appliances by aiding only the careless shipowner, who as we have shown (supra, p. 11) has ample protection against the seaman's carelessness in the contributory negligence rule. The rule pronounced by the Court below is impractical, for the concept of reasonable foreseeability of harm would receive such diverse interpretation from Courts and juries when applied to each of the innumerable appliances aboard ship, that no shipowner could be certain when he had satisfied his legal duty in an appliance case.

2.

The discredited common law simple tool doctrine has no place in Jones Act cases. The shipowner has the same duties and liability with respect to simple tools that he has as to other appliances.

The Court of Appeals did not take notice of the fact that the tool which Respondent failed to provide—an ice chipper—and the tool Petitioner adopted in place of the ice chipper—a knife—were simple tools. In *Jacob* v. *City of New York*, 315 U.S. 752, 62 S. Ct. 854, 86 L. Ed. 1166, this Court apparently discarded the discredited common law simple tool doctrine in Jones Act cases. There the shipowner provided a monkey wrench "probably" adequate for the job but failed to replace a more adaptable type wrench which was worn and defective, after three requests for a new one had been made. A seaman chose the worn wrench and was injured. This Court held that the case should not have been dismissed as the evidence presented a jury question of whether the injury arose out of any "defect or insufficiency, due to its (respondent's) negligence, in its appliances." In reviewing what the

jury might find from the evidence, this Court said it might consider "whether respondent, after it had knowledge of the defect, might not have reasonably foreseen the possibility of resulting harm if it allowed the worn wrench to remain in use." Foreseeability of harm was one of the elements of negligence in the case as the shipowner had provided a wrench which was "probably" adequate for the work, and a request for a new wrench to take the place of the more adaptable but defective one had been made three times; but it was not a necessary element as the shipowners primary negligence consisted in permitting the defective wrench to remain in use; proper inspection would have caused its removal from the working place.

If any vestige of the simple tool doctrine, which developed under different working conditions in shoreside employment, is to be applied in Jones Act cases, certainly it is not the principle that "reasonable foreseeability" of harm is a necessary element of proof where a shipmaster, as here, is so negligent that he fails to provide any adequate appliance for the work. Such a principle would compel the seaman to supply his own tools, a practice which this Court condemned in the *Jacob* case and which is utterly impractical in sea employment, or quit the work which would impair the ship's efficiency and subject him to serious penalties if he is working under orders, *Panama R. Co.* v. *Johnson*, 2 Cir., 289 Fed. 964, aff'd 264 U.S. 375, 44 S. Ct. 391, 68 L. Ed. 748. Certainly a shipowner who fails to provide any adequate simple appliance for the performance of his work is justly chargeable with any harm that may flow from his conduct, whether he can foresee it or not.

3.

The common law doctrine of "reasonable foreseeability" sets up the defense of assumption of risk no longer available in a seaman's appliance case, and obliterates the seaman's traditional and fundamental duty of obedience to orders. Different rules should not be applied in simple tool cases.

The United States Court of Appeals in applying the doctrine of "reasonable foreseeability" in effect held, that although Respondent was negligent in failing to supply an adequate tool the Petitioner assumed the risk when he selected the hazardous knife to do his work. That Court thereby invoked a defense it had previously rejected in *Socony-Vacuum Oil Co.* v. *Smith* (supra). There, in affirming, this Court held that a seaman who "could have avoided the use of the unsafe appliance by the free choice of a safe one" did not assume the risk and said, 305 U.S. at p. 431:

> "Any rule of assumption of risk in admiralty, whatever its scope, must be applied in conjunction with the established admiralty doctrine of comparative negligence and in harmony with it. Under that doctrine contributory negligence, however gross, is not a bar to recovery but only mitigates damages. There being no defense of assumption of risk where the seaman is without opportunity to use a safe appliance, it seems plain that his choice of a defective instead of a safe one, resulting in injury, does not differ in either the quality of the act or in its injurious consequences, in any practical way, from his correspondingly negligent use of a safe or an unsafe appliance, where its use has contributed to an injury resulting from a breach of duty by the owner."

The common law simple tool doctrine rests on the defense of assumption of risk, 3 *Labatte, Master and Servant,*

2nd ed., p. 2479. While *Socony-Vacuum Oil Co.* v. *Smith* did not discuss the simple tool doctrine, although the appliance involved, a defective step plate, might well be classified as a simple tool, the holding impliedly indicates that assumption of risk is not a defense in simple tool cases, for in concluding its opinion, the Court said:

> "We leave to future cases as they may arise the determination of what rule is to apply in cases where the seaman's election to use an unsafe appliance is in disobedience of orders or made while not on duty."

The facts here demonstrate the injustice of applying the defense of assumption of risk in a simple tool case. Unlike Smith, petitioner had no choice of a safe tool. He had to weigh the alternatives of stopping the work and refusing to fill the order, or using the hazardous knife; and unlike Smith, he did not have a free and uncoerced choice of alternatives because of the orders of his superior, the chef, to give the waiters what they ordered and give them good service, and the order of the waiter for 12 portions of ice cream.

Under the Court's charge (R. 108), the jury verdict is a finding that Petitioner was impliedly ordered to use the knife. He was duty bound to obey such order, *Ruskin* v. *Minnesota Atlantic Transit Co.*, 2 Cir., 107 F. 2d 743. Long before the defense of assumption of risk was abolished by *Socony-Vacuum Oil Co.* v. *Smith* (supra), and later by the *Federal Employers' Liability Act* (35 Stat. 66, 45 U.S.C.A. 54) where injury resulted from negligence, the Court below and this Court held that a seaman did not assume the risk of using a defective appliance in obedience of orders as he is bound to obey them, *Panama R. Co.* v. *Johnson* (supra). But in denying recovery, the Court below necessarily held that a seaman is not duty bound to obey the expressed and implied orders of his superiors if they require the use of a hazardous appliance. This is contrary to bedrock maritime law. In *Dar-*

lington v. *National Bulk Carriers, Inc.*, 2 Cir., 157 F. 2d 817, the same Court affirmed the seaman's duty of obedience to orders and stated, "The cases make it clear that the safety of ships at sea might be seriously endangered were the rule" otherwise. There can be no assumption of risk where a seaman acts in obedience of orders, *Masjulis* v. *U.S. Shipping Board Emergency Fleet Corp.*, 2 Cir., 31 F. (2d) 284.

4.

Implicit in the jury verdict is a finding that Respondent could have anticipated or foreseen that Petitioner would use the knife in his work. In reversing, the United States Court of Appeals refused to respect that finding and thereby deprived petitioner of his right to trial by jury given to him by the Jones Act.

The trial judge did not charge the jury that Petitioner could not recover unless Respondent could have reasonably foreseen that he would use the knife (R. 95-113) and Respondent did not request such a charge (R. 93-94). The trial judge did charge that one of the elements the jury might consider was whether Respondent could have anticipated that Petitioner would use the knife (R. 102). The Court of Appeals refused to accept the jury's affirmative answer to that question and substituted its own finding for that of the jury, in holding that the use of the knife "was not within the realm of reasonable foreseeability"; it thereby usurped the jury's function and deprived Petitioner of the right to trial by jury given to him by the Jones Act. This Court condemned that practice in Jones Act cases in *Jacob* v. *City of New York* (supra) and very recently in *Schultz* v. *The Pennsylvania R. Co.*, 350 U.S. 523, 76 S. Ct. 608, 100 L. Ed. 430. In the *Jacob* case, the Court below affirmed the District Court in refusing to submit to the jury the question of the shipowner's neglect

in failing to replace the more adaptable worn wrench, which was a simple tool and this Court said, 315 U.S. at p. 756:

> "But that is no reason for a court to usurp the function of the jury. We are satisfied that a due respect for the statutory guaranty of the right of jury trial, with its resulting benefits, requires the submission of this case to the jury."

CONCLUSION.

The judgment of the United States Court of Appeals for the Second Circuit should be reversed and the judgment of the District Court of the United States, Southern District of New York, should be reinstated.

Dated: New York, N. Y., October 10, 1956.

Respectfully submitted,

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show that the container of ice cream was brought up as customary from a freezing compartment, between 1:00 and 2:00 p. m. on the day of the accident and placed in a special chill box designed to hold the ice cream for service (D. App. 29, 55-58). No evidence was offered as to the temperature of this dispensing chest, though it was established that the temperature of the refrigerator on D deck was five below zero.

The deposition of Sam Shaffran, the chief refrigerating engineer of the SS BRAZIL at the time of the accident, was read by petitioner's counsel. Shaffran testified he could not remember trouble with any of the refrigerating machinery on the day of the accident and he had no record of any such trouble (D. App. 10-13). He stated, however, that any defects always resulted in higher temperature and, hence, softer ice cream (D. App. 12). Petitioner himself said that there never was an occasion when the ice cream became harder rather than softer in the ice cream chest. He said, "The heat of the box didn't cause the ice cream to get hard, it caused it to get soft" (D. App. 71).

There was no evidence that petitioner, either expressly or impliedly, was ever ordered to serve hard ice cream. And, significantly, there was no evidence that any of the ship's supervisory personnel ever knew of the use of a knife for such purpose, a practice described by petitioner himself as improper (D. App. 61).

On this record the Court of Appeals pointed out that there is here no claim of unseaworthiness, that petitioner had been furnished a standard ice cream scoop, that the knife which was used was in no way defective, that it was never designed for or intended to be used as a dagger or an ice pick and that there was no reason for respondent to anticipate that it would be put to such use. The Court then held: